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2 NOT FOR PUBLICATION

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5
6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Jacqueline Ford, an individual,) No. CV-08-1977-PHX-GMS
10 Plaintiff,) **ORDER**
11 vs.)
12)
13 Maricopa County Superior Court)
14 Department of Adult Probation, a division)
15 of the Supreme Court of the State of)
16 Arizona,)
17 Defendant.)
18 _____)

19 Pending before the Court is Defendant's Motion for Summary Judgment (Dkt. # 40).
20 Although not docketed as motions, both parties have also submitted motions to strike (Dkt.
21 ## 45, 47). For the following reasons, the Court grants the motion for summary judgment,
22 grants-in-part and denies-in-part Plaintiff's motion to strike, and grants Defendant's motion
23 to strike.

24 **BACKGROUND**

25 In June 2005, Plaintiff Jacqueline Ford ("Plaintiff") was hired as an adult probation
26 officer by the Maricopa County Superior Court Department of Adult Probation. On July 19,
27 2005, Plaintiff requested a temporary waiver from taking a mandatory defensive tactics
28 training course because she was unable to participate due to her high risk pregnancy.
Barbara Broderick ("Broderick"), who was the chief adult probation officer, received and

1 granted Plaintiff's waiver request.

2 One year later, on July 26, 2006, when Plaintiff was sixteen weeks pregnant, she was
3 involved in a motor vehicle accident. On August 23, 2006, Plaintiff requested leave under
4 the Family and Medical Leave Act of 1993. Dr. Thomas Cerato, who was Plaintiff's primary
5 care physician, completed the request form and stated that Plaintiff was unable to work due
6 to several health problems arising out of the accident and her pregnancy. The Judicial
7 Branch Human Resources Department granted Plaintiff leave through October 18, 2006.

8 The next day, Plaintiff requested an extension of leave until she was medically cleared
9 to work. Plaintiff provided supporting documentation from Dr. Laughead because Dr. Cerato
10 had ceased being Plaintiff's primary care physician. Dr. Laughead stated that Plaintiff
11 required disability leave until six weeks postpartum due to preterm labor. Broderick granted
12 Plaintiff an extension for leave until January 26, 2007 and informed her that, if she was
13 unable to return to work at that time, she needed to provide medical documentation along
14 with an additional written request for leave.

15 Plaintiff gave birth to her daughter in January 2007. On January 24, 2007, Plaintiff
16 requested additional leave through February 27 to give her time to attend her check-up,
17 which was scheduled for late February. Broderick again granted Plaintiff's request for leave
18 through February 27, instructing Plaintiff that, if she was unable to return to work at that
19 time, she would need to submit an additional request for leave along with supporting
20 documentation.

21 On February 22, 2007, Plaintiff attended an examination at Physiotherapy Associates,
22 which was to report to Plaintiff's physician so that Plaintiff could be cleared to return to
23 work. Plaintiff, however, was unable to complete the examination because her daughter
24 unexpectedly developed health problems. On February 23, 2007, Plaintiff requested
25 additional leave because of her daughter's health and because she had to reschedule the
26 appointment with Physiotherapy Associates before her doctor would clear her to work.
27 Plaintiff included documentation from Physiotherapy Associates confirming the reason that
28 the examination was cancelled, although this documentation did not provide any date upon

1 which Plaintiff likely would be healthy enough to return to work.

2 On May 5, 2007, Broderick issued a letter acknowledging receipt of Plaintiff's
3 February 23 request and separating Ford from her position due to her medical inability to
4 perform her position. The letter cited a regulation, Section 16(D) of the Judicial Merit
5 System Resolution, which allows separation from employment without prejudice if the
6 employee demonstrates an inability to work because of medical reasons. The letter also
7 explained that Ford's request for an extension was denied because she did not submit
8 appropriate medical documentation indicating either the need for an extension or an
9 anticipated return date. Broderick then informed Plaintiff that she could, in writing, request
10 a review of the decision within ten days and could seek reinstatement for one year.

11 Plaintiff asserts that she immediately called (but did not write to) Human Resources
12 and was informed that she could be reinstated quickly if she made an appointment with
13 Broderick. Plaintiff's request for an appointment with Broderick, however, was denied. On
14 March 12, 2007, Plaintiff informed Broderick of these circumstances and stated that she was
15 medically cleared to return to work. Shortly thereafter, Plaintiff provided a note from Dr.
16 Laughead, who released Plaintiff to work without restrictions, and a note from Dr. Cerato,
17 who released Plaintiff with several restrictions. Dr. Cerato's restrictions prevented Plaintiff
18 from performing field work and wearing a sidearm, as well as engaging in behavior that
19 risked bodily harm.

20 On March 19, 2007, Broderick acknowledged receipt of Plaintiff's letter and
21 physicians notes. Based on the restrictions Dr. Cerato prescribed, Broderick determined that
22 Plaintiff had not demonstrated a medical ability to do fieldwork as required for her former
23 position. Broderick further explained that Dr. Cerato's opinion, which included significant
24 restrictions affecting Plaintiff's ability to perform the job functions, contradicted the opinion
25 of Dr. Laughead. Broderick accordingly denied Plaintiff's request for reinstatement. On
26 March 23, 2007, Plaintiff submitted a request for review of her dismissal to Phillip Hanley,
27 but her request was denied because Plaintiff filed the request more than ten days after her
28 dismissal.

1 Plaintiff again requested reinstatement on April 9, 2007, including an updated letter
2 from Dr. Cerato that again released Plaintiff to work—this time without any restrictions. The
3 parties dispute whether Plaintiff received a response from Broderick, although Defendant
4 contends that Broderick rejected Plaintiff’s request because Dr. Cerato’s second note was
5 inconsistent with his first note.

6 Plaintiff then filed a charge of discrimination with the Equal Employment Opportunity
7 Commission, alleging sex discrimination based on Title VII of the Civil Rights Act of 1964
8 (“Title VII”). The instant action ensued.

9 DISCUSSION

10 I. Motions to Strike

11 A. Plaintiff’s Motion to Strike

12 Plaintiff moves to strike the entire motion for summary judgment or, in the alternative,
13 designated portions of the record. Plaintiff contends that several pieces of evidence were not
14 disclosed under Federal Rule of Civil Procedure 26(a) within the deadlines imposed by the
15 Court’s Case Management Order (Dkt. # 16) and that this evidence is inadmissible under
16 Rule 37(b)(2)(A).¹ The Case Management Order set January 8, 2010 as the deadline for the
17 completion of fact discovery, (Dkt. # 16), but Plaintiff contends the Motion for Summary
18 Judgment includes facts not disclosed before that date.

19 Plaintiff first argues that Defendant had an obligation to disclose Broderick’s
20 declaration before moving for summary judgment. A party, however, has no obligation to
21 provide declarations used in support of a summary judgment motion other than to file it along
22 with the motion. *SEC v. Poirier*, 140 F. Supp.2d 1033, 1041–42 (D. Ariz. 2001). Defendant,
23 therefore, correctly filed Broderick’s declaration as an exhibit to its separate statement of
24 facts.

25 Plaintiff also avers that Broderick’s declaration exceeds the scope of properly-

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27 ¹ Plaintiff seeks only Rule 37(b) relief. To the extent Plaintiff’s argument has merit,
28 however, it appears that Rule 37(c) would also prevent Defendant from using information
that was not properly disclosed under Rule 26(a). Fed. R. Civ. P. 37(c).

1 disclosed information. For example, Plaintiff contends she had no notice that Broderick was
2 the “appointing authority” with the ability to grant waivers, determine separation from
3 employment, and evaluate reinstatements. Broderick’s deposition, however, includes
4 multiple references to this authority. (Dkt. # 48, Ex. B.) Plaintiff likewise argues that
5 Broderick’s declaration improperly explains for the first time the “field work” duties that
6 someone in Plaintiff’s position would have to perform. Contrary to this assertion, however,
7 not only did Broderick’s deposition explain that field work was a job requirement, but also
8 Defendant disclosed that Broderick was the head of adult probation, a position that is likely
9 to have information about the relevant job requirements. (Dkt. # 48, Ex. A, B.)

10 Plaintiff also contends that Defendant failed to disclose information about Broderick’s
11 employment policies and about nine other employees who were separated from their
12 positions after taking medical leave. Defendant’s initial disclosure statement, however,
13 disclosed Broderick’s knowledge of employment practices based on medical leave. (Dkt. #
14 48, Ex. A.) Further, Defendant’s First Supplemental Disclosure Statement specified that
15 eight other employees were separated from their jobs for medical reasons. (Dkt. # 48, Ex. C.)

16 Evidence of the ninth employee, however, was not disclosed until the Third
17 Supplemental Disclosure Statement, which was filed on February 26, 2010, more than a
18 month after the discovery deadline. (Dkt. # 48, Ex. D.) Therefore, under Rule 37, facts
19 about this ninth individual are not properly before the Court. Defendant incorrectly asserts
20 that it was allowed to disclose the individual as a Rule 26(e) supplemental disclosure. That
21 rule, however, requires supplementation when a party learns that its prior disclosures are in
22 some way incomplete or inaccurate. *See* Fed. R. Civ. P. 26(e) advisory committee notes to
23 the 1993 Amendments. Rule 26(e) does not give a party *carte blanche* authority to add new
24 facts after discovery has closed.

25 The Court also strikes the section of Broderick’s declaration that, prior to Plaintiff’s
26 application for reinstatement, a male employee had his reinstatement request denied. (Dkt.
27 # 41, Ex. A.) This fact was not disclosed prior to the declaration. Rather, Broderick testified
28 in her deposition that she was not sure whether any other employees had sought

1 reinstatement.

2 While the Court strikes these portions of the record, it is unnecessary to strike the
3 entire Motion for Summary Judgment, as this information does not substantially alter the
4 Court's analysis of the Motion for Summary Judgment. The remaining topics of Plaintiff's
5 Motion to Strike are not relevant to the Court's decision in the Motion for Summary
6 Judgment, and are, therefore, denied as moot.

7 **B. Defendant's Motion to Strike**

8 Defendant moves to strike a portion of Plaintiff's declaration, which refers to an
9 employee, Bill Hawkins, who allegedly was not released even after taking extended medical
10 leave. Plaintiff, however, never disclosed Bill Hawkins prior to filing her Response to the
11 Motion for Summary Judgment, which was filed after the discovery deadline. This untimely
12 addition of evidence may have prevented Defendant from developing rebuttal evidence, and
13 the Court, therefore, strikes any references to Bill Hawkins.²

14 **II. Plaintiff's Title VII Claim**

15 Summary judgment is appropriate if the evidence, viewed in the light most favorable
16 to the nonmoving party, shows "that there is no genuine issue as to any material fact and that
17 the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Substantive
18 law determines which facts are material, and "[o]nly disputes over facts that might affect the
19 outcome of the suit under the governing law will properly preclude the entry of summary
20 judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party
21 "bears the initial responsibility of informing the district court of the basis for its motion, and
22 identifying those portions of [the record] which it believes demonstrate the absence of a
23 genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Then,
24 the burden is on the nonmoving party to establish a genuine issue of material fact. *Id.* at
25 322–23. The nonmoving party "may not rest upon the mere allegations or denials of [the

27 ² Even if the Court had not stricken this portion of the record, it appears that the
28 evidence would still be inadmissible both for lack of foundation and for hearsay.

1 party's] pleadings, but . . . must set forth specific facts showing that there is a genuine issue
2 for trial." Fed. R. Civ. P. 56(e); see *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
3 U.S. 574, 586-87 (1986).

4 "Title VII . . . prohibits employers from failing or refusing to hire or discharging 'any
5 individual . . . because of such individual's . . . sex.'" *Palmer v. Pioneer Inn Assocs., Ltd.*, 338
6 F.3d 981, 984 (9th Cir. 2003) (citing 42 U.S.C. § 2000e-2(a)(1)). "Title VII defines
7 discrimination 'because of sex' as including discrimination 'because of or on the basis of
8 pregnancy, childbirth, or related medical conditions.'" *Id.* (citing 42 U.S.C. § 2000e(k)).

9 The parties agree that Plaintiff must establish her case under the framework set forth
10 in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this framework, a
11 plaintiff establishes a prima facie case of discrimination by showing that "(1) she belongs to
12 a protected class; (2) she was qualified for the position; (3) she was subjected to an adverse
13 employment action; and (4) similarly situated [individuals outside of her protected class]
14 were treated more favorably." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th
15 Cir. 2002) (citing *McDonnell Douglas*, 411 U.S. at 802). "If the plaintiff establishes a prima
16 facie case, the burden of production--but not persuasion--then shifts to the employer to
17 articulate some legitimate, nondiscriminatory reason for the challenged action." *Id.* (citing
18 *McDonnell Douglas*, 411 U.S. at 802). "If the employer does so, the plaintiff must show that
19 the articulated reason is pretextual either directly by persuading the court that a
20 discriminatory reason more likely motivated the employer or indirectly by showing that the
21 employer's proffered explanation is unworthy of credence." *Id.* (internal quotations omitted).

22 Plaintiff has failed to present a prima facie case. Specifically, the fourth element is
23 lacking because Plaintiff presents no evidence that similarly situated individuals outside of
24 her protected class were treated more favorably. See *Villiarimo*, 281 F.3d at 1062 (citing
25 *McDonnell Douglas*, 411 U.S. at 802). Plaintiff seems to be alleging three separate instances
26 of discrimination (the initial separation from employment and two applications for
27 reinstatement), but she does not present a prima facie case for any of these three instances.
28 Plaintiff cannot show that similarly situated males or non-pregnant females were treated more

1 favorably than Plaintiff was treated either in termination or reinstatement.

2 Regarding the initial separation from her employment, Plaintiff admitted twice in her
3 deposition that she was unaware of any other employees took extended medical leave and
4 then were allowed to remain employed. Defendant, however, presents evidence that eight
5 other employees, including several women, were separated from their positions for medical
6 reasons.³ According to Defendant, each of these employees was terminated after taking
7 medical leave without pay, as was Plaintiff. Plaintiff's Response does not challenge these
8 facts.

9 The statement of facts, but not the Response, cites sections of Plaintiff's deposition
10 and declaration discussing two individuals who allegedly were treated differently from
11 Plaintiff. As already discussed, Plaintiff's declaration mentions Bill Hawkins, who
12 purportedly kept his job after taking medical leave. Plaintiff's deposition also discusses
13 Melissa Rivas, an employee who had a baby and missed a deadline regarding her leave
14 application. Plaintiff asserts that Defendant contacted Rivas to help her maintain her leave,
15 whereas Plaintiff was separated from her job after not complying with Defendant's policy
16 for filing documentation supporting the need for further leave. As for Bill Hawkins, Plaintiff
17 cannot use this evidence because the Court has stricken it for failure to comply with Federal
18 Rule of Civil Procedure 26(a). And regarding both Hawkins and Rivas, Plaintiff's assertions
19 appear inadmissible by reason of hearsay and lack of foundation. Even if Plaintiff's
20 assertions regarding Hawkins and Rivas were admissible, Plaintiff has presented no evidence
21 from which the Court could conclude that either was a similarly situated employee. Plaintiff
22 has not explained their qualifications, the importance of their positions, their reasons for
23 taking leave, the extent of their medical leave, the evidence submitted indicating their
24 medical clearance to work, or any other facts that would allow the Court to compare the three
25 employees' situations. The evidence offered by Plaintiff, therefore, does not create a genuine
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27 ³ Defendant's Motion discusses nine employees, but the Court has determined that one
28 of the employees was not properly disclosed. *See supra* Section I-A.

1 issue of fact.⁴

2 Regarding the requests for reinstatement, Plaintiff presents no admissible evidence
3 that any employee has been reinstated after separation in circumstances analogous to hers.
4 Plaintiff admitted in her deposition that she was unaware of any employees who received
5 better treatment than she did. Plaintiff's statement of facts asserts simply that "Plaintiff is
6 aware of other employees who were treated differently." (Dkt. # 46.) Such a blanket
7 statement, unsupported by specific facts or foundation fails to establish a material issue of
8 fact.

9 Finally, Plaintiff's already insufficient evidence is further weakened by the same actor
10 inference. "[W]here the same actor is responsible for both [positive and negative treatment]
11 of a discrimination plaintiff, and both actions occur within a short period of time, a strong
12 inference arises that there was no discriminatory motive." *Bradley v. Harcourt, Brace & Co.*,
13 104 F.3d 267, 270–71 (9th Cir. 1996). Specifically, the same actor inference applies to the
14 treatment of women taking pregnancy-related leave. *See Muhleisen v. Wear Me Apparel*
15 *LLC*, 644 F. Supp. 2d 375, 386 (S.D. N.Y. 2009) (finding it "quite difficult to reconcile" the
16 defendant's "willingness to hire plaintiff while she was on maternity leave in January 2006
17 and to provide her three months' paid maternity leave a year later with plaintiff's allegation
18 that he discriminatorily fired her because she was pregnant or because of her gender in March
19 2007"); *Panetta v. Sheakley Group, Inc.*, —F. Supp. 2d—, 2010 WL 1494987 at *5 (S.D.
20 Ohio Apr. 14, 2010) (granting employer summary judgment where the employer hired the
21 plaintiff knowing that she was pregnant and subsequently granted her maternity leave, before
22 ultimately firing the plaintiff eleven months later); *see also Ragsdale v. Holder*, 668 F. Supp.
23 2d 7, 22–23 (D.C. Cir. 2009) (applying the same actor inference to annual leave and holding
24 that the fact that a supervisor first granted a plaintiff leave during one pay period gave rise
25 to an inference that the employer did not act with discriminatory animus when the supervisor
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27 ⁴ Because Plaintiff's prima facie case fails under the fourth element, the Court need
28 not consider any other elements of a prima facie case.

1 subsequently denied plaintiff's similar request for leave in a later pay period). The inference
2 is based on the principle that an employer's initial "willingness to treat [an] employee
3 favorably" is "strong evidence that the employer is not biased against the protected class to
4 which the employee belongs." *Coghlan v. Am. Seafoods Co.*, 413 F.3d 1090, 1096, 1097 (9th
5 Cir. 2005). The Court must take the inference into account on summary judgment, and a
6 plaintiff can defeat the same-actor inference only with an "extraordinarily strong showing
7 of discrimination." *Id.* at 1097, 1098.

8 In this case, Broderick decided to separate Plaintiff from her position and to deny her
9 two requests for reinstatement during the first half of 2007. In August of 2005, however,
10 Broderick granted Plaintiff's request for a waiver from taking the defensive tactics class due
11 to her then-existing pregnancy. Likewise, in November 2006 and January 2007, Broderick
12 granted Plaintiff two extensions of her medical leave due to her pregnancy. Therefore, an
13 inference arises that Broderick's actions in 2007 were not motivated by discrimination based
14 on gender. As Plaintiff's Response offers no meaningful response to this inference, Plaintiff
15 has not made the "extraordinarily strong showing of discrimination" necessary to overcome
16 the same actor inference. *See Coghlan*, 413 F.3d at 1097.

17 CONCLUSION

18 Plaintiff has not established a prima facie case for discrimination. Because Plaintiff's
19 prima facie case fails, the Court need not address the remaining steps of the *McDonnell*
20 *Douglas* test.

21 **IT IS THEREFORE ORDERED** that Defendant's Motion for Summary Judgment
22 (Dkt. # 40) is **GRANTED**.

23 **IT IS FURTHER ORDERED** that although not clearly designated as motions,
24 Plaintiff's Motion to Strike (Dkt. # 45) is **GRANTED-IN-PART** and **DENIED-IN-PART**,
25 and Defendant's Motion to Strike (Dkt. # 47) is **GRANTED**.

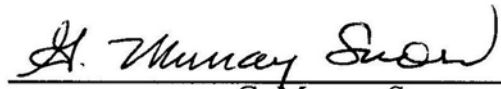
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1 **IT IS FURTHER ORDERED** directing the Clerk of the Court to **TERMINATE** this
2 matter.

3 DATED this 3rd day of June, 2010.

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6 _____
 G. Murray Snow
 United States District Judge